No. 82-1703

In the Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH G. RUSH AND FIFTH THIRD BANK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH G. RUSH AND FIFTH THIRD BANK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, trustees of a trust, seek review of the decision below holding that they are not entitled to deduct amounts permanently set aside under the trust but not actually paid to charity under Section 642(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts are as follows: On September 30, 1968, Linus E. Russell executed a revocable trust instrument. The trust was funded with a check for $3.6 million. The trust instrument specified that Russell was to receive the net trust income during his lifetime, and that upon his death, if he was survived by his wife Ruth, the corpus was to be divided into Trust No. 1 and Trust No. 2. The income from Trust No. 1 was to be paid to Ruth during her lifetime, but the income from Trust No. 2 was to be accumulated for Ruth's potential benefit during her lifetime. The government conceded, however, that there is no substantial likelihood that the assets of Trust No. 2 will ever be invaded to

support Ruth. After her death, the income from Trust No. 2 is to be paid to her two children. Upon the death of the last to die of Ruth and her children, the entire assets of Trust No. 2 are to be paid equally to two charities (Pet. App. C1-C2).

Item 13 of the Trust Agreement provided (Pet. App. C2):

> The Settlor reserves the right, at any time, and from time to time, by instrument in writing delivered to the Trustees, to amend, modify or revoke this trust in whole or in part.

Prior to December 8, 1969, Russell was able to conduct all his personal and business affairs. On that date, he was admitted to a hospital in a confused state and unable to conduct his financial affairs. He died on February 5, 1970 (Pet. App. C2). Trust No. 2 was funded on September 27, 1973, and in accordance with its terms, amounts of $42,883.01 and $84,406.41 were permanently set aside for the charities in 1973 and 1974. On audit, the Internal Revenue Service disallowed the trust's claimed deductions in these amounts (Pet. App. C3).

In this refund suit brought by petitioners in the United States District Court for the Southern District of Ohio, the district court held for petitioners. It concluded that the requirements of Section 642(c) had been met because the trust was irrevocable in 1973 and 1974 when the amounts were permanently set aside.[1] The court of appeals reversed.

---

[1]Section 642(c)(2) provides as follows:

> (2) *Amounts permanently set aside*—In the case of an estate, and in the case of a trust * * * required by the terms of its governing instrument to set aside amounts which was—
>
> (A) created on or before October 9, 1969, if—
>
> (i) an irrevocable remainder interest is transferred to or for the use of an organization described in section 170(c), or

It held that Section 642(c), properly construed, permits a deduction for amounts permanently set aside for charity only if the trust provision so directing was irrevocable on and after October 9, 1969. Since, on that date, Linus Russell was mentally competent and empowered to revoke, amend, or modify his trust, no deduction was allowable (Pet. App. C2-C6).

1. The court of appeals correctly held that petitioners were not entitled to their claimed charitable deductions. As part of the Tax Reform Act of 1969 (Pub. L. No. 91-172, Section 201(b), 83 Stat. 558), Section 642(c) was amended to eliminate deductions by a trust for amounts permanently set aside for, but not actually paid to, charity. A limited exception was created for amounts set aside under trusts created on or before October 9, 1969, if either (1) "an irrevocable remainder interest is transferred" to charity or (2) "the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust." Subsection (A)(i) and (ii).

Both the statutory language and the legislative history make clear that amounts set aside for charity are deductible only if made pursuant to a trust that could not be modified at any time on or after October 9, 1969. Here, to the contrary, the trust was revocable, and the grantor concededly was capable of conducting his affairs for nearly two months after that statutory cutoff date.

(ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust; or

* * * * *

there shall also be allowed as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for a [charitable purpose] * * *.

The exception to the elimination of deductions for amounts permanently set aside for charity originated with a Treasury Department recommendation that the elimination of the set-aside deduction should not apply to a trust instrument that could not be modified on or prior to the cutoff date, "unless and until it [becomes] possible to amend the instrument." Technical Memorandum of Treasury Position, submitted to Senate Finance Committee, September 30, 1969.[2] The Senate adopted the recommendation, explaining that it applied to a trust established before the cutoff date:

> which is required by the terms of its governing instrument to set aside amounts, either if an irrevocable remainder interest in the trust was given to charity or if the trust could not be modified at any time after October 9, 1969, because the grantor was under a mental disability to change its terms at all times after that date.

S. Rep. No. 91-552, 91st Cong., 1st Sess. 86 (1969).

Thus, subsection (A)(i) and (ii) are parallel provisions which prohibit a deduction unless the charitable remainder interest was irrevocable on October 9, 1969, or the settlor was continuously mentally disabled from that date.[3]

2. Petitioners contend (Pet. 7) that because the permanent set-aside was irrevocable when made in 1973 and 1974—when the settlor had already died—Section 642(c)(2)(A)(i)

---

[2]The Memorandum recommended a cutoff date of August 1, 1969, which was extended by the Senate to October 9, 1969.

[3]Since Linus Russell was mentally competent between October 9, 1969, and December 8, 1969, petitioner makes no claim to a deduction under Section 642(c)(2)(A)(ii).

authorizes a deduction. But at the time an amount is *permanently* set aside, it is, by definition, *irrevocably* set aside. It therefore follows, in petitioners' view, that any amount permanently (*i.e.*, irrevocably) set aside by a trust formed on or before October 9, 1969, is deductible. Such an interpretation of Section 642(c)(2) would render subsection (A)(i) and (ii) redundant, since they could never operate to define circumstances under which amounts permanently set aside would not be deductible. If Congress had intended to permit deductions for all permanent set-asides by trusts established before the critical date, it could have said so quite simply and directly in Section 642(c). Instead, since it enacted subsection (A)(i) and (ii). Congress therefore quite clearly intended a different result. As the cited legislative history indicates, and as the court of appeals correctly concluded (Pet. App. C7), Congress' purpose in enacting those subsections was to exempt only those charitable set asides which could not be modified on October 9, 1969.[4]

Finally, petitioners contend (Pet. 5) that the differing opinions of the courts below leave a substantial question to be resolved and might produce further litigation. There is, however, no conflict between courts of appeals on this issue. Indeed, to our knowledge, in the 14 years since since Section 642(c)(2) was enacted, this is the first and only case in which its meaning has been litigated. Moreover, the transitional rule at issue here is of only minor administrative importance.

---

[4]Petitioners support their view that irrevocability is to be tested at the time of the set-aside, rather than on October 9, 1969, by pointing (Pet. 7) to the language "is transferred" contained in the statute. That language, however, refers simply to the existing trust terms. The Senate Report confirms Congress' intent to test revocability by the terms of the trust itself. It provides that the set-aside deduction will be available only "if an irrevocable remainder interest in the trust *was* given to charity." S. Rep. No. 91-552, *supra* , at 86 (emphasis added).

It is therfore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

DOJ-1983-05